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Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1999

EDWARD E. LITWAK, Petitioner,
v.
OSCAR PRODUCTIONS, INC. (f/s/o Jennifer O'Neill)
and JENNIFER O'NEILL, Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In nondischargeability proceedings under 11 USC § 523, should the federal rule of collateral estoppel apply to a default judgment entered in a state court proceeding.

2. Does the full faith and credit statute (28 USC §1738) require the bankruptcy court to apply the state rule of collateral estoppel in nondischargeability proceedings, and if so, has 28 USC § 1738 been partially repealed as to true default judgments entered by state courts.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

EDWARD E. LITWAK, PETITIONER,

V.

OSCAR PRODUCTIONS, INC. (f/s/o Jennifer O'Neill) and JENNIFER O'NEILL, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Edward E. Litwak ("Litwak") respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1-A to 5-A), bankruptcy appellate panel (App., *infra*, 6-A to 14-A), and the bankruptcy court's Judgment and Findings of Fact and Conclusions of Law (App., *infra*, 15-A to 22-A) are unreported.

JURISDICTION

The court of appeals entered its judgment on May 2, 2000 (App., *infra*, 2-A to 5-A). The court of appeals denied a timely petition for rehearing and petition for rehearing en banc on June 12, 2000 (App. *infra*, 1-A). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

STATUTORY PROVISIONS INVOLVED

Article I §8, cl. 4 of the United States Constitution provides, in relevant part, that the power is vested in Congress " to establish ... uniform laws on the subject of bankruptcies throughout the United States."

11 USC Section 523 (c) provides, in relevant part that

> ". . .the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge . . . ."

28 USC §1738 provides, in relevant part, that

> ". . . judicial proceedings ... shall have the same full faith and credit in every court within the United States ... as they have

by law or usage in the courts of such State ... from which they are taken."

STATEMENT OF THE CASE

The jurisdiction of the bankruptcy court was invoked under 28 USC §157 (b) (2) (1), a core proceeding arising under Title 11 [11 USC §523(a)(2)(A) and (a)(6)]. The facts germane to this petition are undisputed.

On March 17,1997, a state court default judgment was entered against Litwak based on fraud and intentional infliction of emotional distress in favor of Respondents, Oscar Productions, Inc. (f/s/o Jennifer O'Neill) and Jennifer O'Neill (collectively "O'Neill"). The amount of the judgment was $6,250,000.00, plus $2,230,559.40 in prejudgment interest, and costs of $182.00, together with interest as provided by law. Litwak had no knowledge that the judgment had been entered until his bank account was attached, more than four years after the Request To Enter Default had been entered.

On November 5,1997, Litwak filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code, seeking to discharge the debt. O'Neill filed an adversary proceeding on January 8, 1998 to determine the non-dischargeability of the debt pursuant to 11 U.S.C. §523 (a) (2)(A) (fraud) and 523(a)(6) (willful and malicious injury).

On May 26,1998, the bankruptcy court granted O'Neill's motion for summary judgment. The Court found that under applicable 9th Circuit law, *Gayden v. Nourbakhsh (In re Nourbakhsh)* 67 F. 3d 798 (9th Cir.

1995) collateral estoppel precluded relitigation of the state court default judgment (App. *infra*, 20-A).

On June 11, 1998, the bankruptcy court entered an order that Litwak's debt to O'Neill was non-dischargeable under 11 U.S.C. §523(a)(2)(A) and (a)(6). Judgment was entered in favor of O'Neill and against Litwak in the amount of $8,480,741.40 (App. *infra*, 15-A).

On June 17,1998, Litwak filed his Notice of Appeal to the 9th Circuit Bankruptcy Appellate Panel ("BAP").

On March 2,1999, the BAP affirmed the bankruptcy court's order. The BAP found that the bankruptcy court correctly held that the default judgment was entitled to collateral estoppel application pursuant to *In re Nourbakhsh, supra* (App. *infra*, 6-A to 14-A).

On March 25,1999, Litwak filed his Notice of Appeal to the Ninth Circuit Court of Appeals.

On May 2, 2000, the Court of Appeals affirmed the bankruptcy court's order. The Court of Appeals held that the issues in this case are the same as presented in *In re Nourbakhsh, supra* and therefore, the Court of Appeals was bound by the *Nourbakhsh* holding unless the case was taken en banc and *Nourbakhsh* was overruled (App. *infra*, 2-A to 5-A).

On May 16, 2000, Litwak filed a Petition For Rehearing And Suggestion for Rehearing En Banc (the "Petition for Rehearing"). On June 12, 2000, Litwak's Petition For Rehearing was denied (App. *infra*, 1-A).

REASONS FOR GRANTING THE PETITION

This case presents an issue of national significance. In *Grogan v. Garner*, 498 U.S. 279, 284-285, *n. 11 (1991), this Court stated that collateral estoppel* principles apply in bankruptcy nondischargeability cases. Grogan did not, however, address whether courts should apply the state or federal rule of collateral estoppel. In federal court, a "true" default judgment will not be given preclusive effect, because it does not meet the "actually litigated," requirement. It is unclear whether courts should apply the state rule of collateral estoppel pursuant to the full faith and credit statute or whether application of the federal rule is consistent with this Court's decision in *Grogan v. Garner, supra.* As a result of this uncertainty, there is a split of authority among the six Courts of Appeal that have addressed the issue.

Moreover, in the circuits that have not addressed the issue, there are conflicting decisions by intra-circuit bankruptcy courts. Debtors within a state are treated differently on the important issue of a right to a discharge, violating the constitution's mandate for "uniform laws on the subject of bankruptcies throughout the United States". Article I §8, cl. 4. This constitutional mandate differentiates this case from other areas of law where 28 USC §1738 compels courts to give full faith and credit to a state court judgment.

This case is timely[1] and guidance from this

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[1] "The differing judicial views regarding the collateral estoppel effect of default judgments in dischargeability proceedings create a dramatic conflict requiring resolution, either by Congress or the Supreme Court."

Court will have an actual, practical effect for courts throughout the United States and for countless litigants.

I.
THE GROGAN DECISION REQUIRES APPLICATION OF THE FEDERAL RULE OF COLLATERAL ESTOPPEL

In *Grogan v. Garner, supra*, a district court jury trial resulted in a fraud judgment in favor of Petitioners. Respondent appealed the trial court's ruling that authorized a verdict based on the preponderance of the evidence. While the appeal was pending, Respondent filed a petition for relief under Chapter 11 of the Bankruptcy Code. After the Court of Appeals affirmed the fraud judgment, Petitioners filed a complaint in the bankruptcy proceeding alleging that the fraud judgment was nondischargeable under §523. The Bankruptcy Court found that all of the elements required to establish actual fraud under §523 had been proved and that the doctrine of collateral estoppel required a holding that the debt was not dischargeable. The Court of Appeals, reversed, holding that the clear and convincing standard applied to non-dischargeability proceedings. *Grogan, supra* at 281-282.

In reversing the Court of Appeals and holding that the preponderance standard applied in

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Tisha Morris Federico, 71 Am. Bankr. LJ., 563, 585 (1997); *Dischargeability Proceedings and Prepetition Default Judgments Does the Bankruptcy Code Implicitly Repeal The Full Faith and Credit Requirement of 28 USC §1738?*

nondischargeability proceedings, this Court held as follows:

> "If the preponderance standard also governs the question of non-dischargeability, a bankruptcy court could properly give collateral estoppel effect to those elements of the claim that are identical to the elements required for discharge and that were actually litigated and determined in the prior action. See Restatement (Second) of Judgments §27 (1982)." (emphasis added) *Grogan, supra* at 284.

Thus, as this Court stated, two conditions must be present before bankruptcy courts can apply collateral estoppel in a nondischargeability proceedings: 1) the elements of the two claims must be identical; and 2) the elements were "actually litigated" and determined in the prior action. The dispute that has arisen, is whether a default judgment satisfies the "actually litigated" condition. This Court's citation to Restatement (Second) of Judgments §27 (1982), however, defined when a claim is "actually litigated." The Restatement's discussion of issues not actually litigated includes the following:

> "A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action. There are many reasons why a party may

> choose not to raise an issue, or to contest an assertion, in a particular action.
>
> . . . .
>
> In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of this Section does not apply with respect to any issue in a subsequent action. (emphasis added) Restatement (Second) of Judgments §27 pp 256-257 (1982).

Furthermore, this Court stated, and re-stated, that nondischargeability is a matter of federal law. "Since 1970, however, the issue of nondischargeability has been a matter of federal law governed by the terms of the Bankruptcy Code. " *Grogan, supra* at 284. Congress amended the Bankruptcy Act in 1970 to make nondischargeability a question of federal law independent of the issue of the validity of the underlying claim."' *Grogan, supra* at 289.

II.
APPLICATION OF GROGAN - THE CONFLICT AMONG THE COURT OF APPEALS

The Appellate Courts that have applied Grogan to determine whether a bankruptcy court should give collateral estoppel effect to a state court default judgment, adopt either the federal rule or the analytical framework set forth in *Marrese v. American Academy of Orthopaedic Surgeons,* 470 U.S. 373 (1985).

Under the federal rule of collateral estoppel, the issues sought to be precluded must have been actually

litigated in the prior proceeding as defined by the Restatement (Second) of Judgments §27 (1982). Most of these cases hold that *Brown v. Felsen*, 442 U.S. 127 (1979) requires bankruptcy courts to apply federal law to determine the collateral estoppel effect of a state court judgment. *Angus v. Wald (In re Wald)* 208 B.R. 516, 520 (Bkrtcy. N.D. Ala. 1997).

Courts that follow the Marrese approach, apply a two-part test:

1. First, the preclusive effect of plaintiffs' state court default judgment under state collateral estoppel law in which the judgment was rendered.

2. Second, if the judgment would have preclusive effect under the applicable state law, the full faith credit statute of 28 U.S.C. §1738 requires recognition of that result, unless as an exception to §1738, the Court should refuse to give preclusive effect to the state court judgment. *Matsushita Electric Industrial Co. Ltd. v. Epstein*, 516 U.S. 367, 375 (1996).

The Third, Fourth and Seventh Circuit Courts of Appeal hold that a default judgment does not satisfy the "actual litigation" requirement to invoke collateral estoppel.

A. Courts of Appeal That Apply The Federal Rule

In *M & M Transmissions, Inc v. Raynor, (In re Raynor)*, 922 F.2d 1146 (4th Cir. 1991), the court held that an indispensable requirement of collateral estoppel is actual litigation of the issue. In the Fourth Circuit, " [t] o preclude a debtor from litigating an issue dispositive of discharge, the record of the case giving rise to the judgment debt must show that the issue was

actually litigated .... *Id.* at 1149. Citing the Restatement (Second) Judgments §27 comment e, the court concluded that a state court default judgment cannot support issue preclusion. *Id.* at 1150. Accordingly, the basis for the court's decision was that the federal, not the state rule of collateral estoppel applied.

In *Pahlavi v. Ansari (In re Ansari),* 113 F. 3d 17 (4th Cir. 1997) a state court entered a default judgment against Ansari for fraud and breach of fiduciary duty after it found that Ansari had willfully disregarded multiple discovery orders. *Id* at 18. Subsequently, Ansari filed Chapter 7 and the bankruptcy court granted Pahlavi's motion for summary judgment for nondischargeability (11 USC §523 (a) (4) based on collateral estoppel. Ansari argued that the default judgment did not meet the "actually litigated" requirement.

The *Ansari* court applied *Marrese* and determined that under Virginia law, Ansari's conduct and participation in the litigation met the actually litigated standard. Prior to the default, multiple depositions were taken, documents exchanged, and hearings held. *Id.* at 21 With respect to punitive damages, the court held a two-day hearing in which Pahlavi and Ansari, and other witnesses testified. *Id.* at 21.

The court stated, however, that the holding in *Ansari* is not contrary to its holding in *In re Raynor, Id.* at 21. First, Virginia law governed *Ansari* and North Carolina law controlled in *Raynor.* The court went on to state, however, that:

> . . . even if Virginia law had been applicable in *Raynor* it is not at all clear

> that the result there would have been different. This is so because in *Raynor*, unlike the case at hand, the parties engaged in literally *no* litigation on the issue of fraud." (emphasis original) *Id.* at 21.

Lastly, the court noted that the policy concerns expressed by the Fifth, Eleventh, and Ninth Circuits that a default judgment entered for discovery violations can act as collateral estoppel in a later case, justified application of collateral estoppel. *Id.* at 22.

The Seventh Circuit has also held that

> "...a default judgment is normally not given preclusive effect under collateral estoppel doctrine because no issue has been 'actually litigated.' " (citation omitted) *Meyer v. Rigdon* 36 F. 3d 1375, 1379 (7th Cir. 1994).

Although Meyer involved a judgment granted by a federal district court, the court recognized that default judgments are not given preclusive effect in dischargeability actions.

In Meyer, the court considered whether a default judgment for breach of fiduciary duty obtained in a federal district court against a bank's board of directors was nondischargeable under §523 (a) (11). *Id.* at 1378. Under that section, any final judgment for fraud or defalcation in a fiduciary capacity committed against a depository institution is nondischargeable. The court held that Congress, in enacting §523 (a) (11), preempted the common law principles of collateral estoppel. *Id.* at

1380. Therefore, under that section, the bankruptcy court is required to "give preclusive effect to dispositions, like default judgments . . ., that would not be given preclusive effect under the common law." *Id.* at 1380. Accordingly, the court believed that Congress, in passing §523 (a) (11), recognized that default judgments are not given preclusive effect in dischargeability actions. The court noted that §523 (a) (11) would be superfluous if it did not apply to default judgments because it would then have the same effect as section 523 (a) (4). *Id.* at 1380. Moreover, a bankruptcy court within the Seventh Circuit relied on *Meyer* in its decision to deny collateral estoppel effect to a state court default judgment. *Schaffer v Dempster (In re Dempster)*, 182 B.R. 790, (Bankr. N.D. Ill. 1995). ["As a matter of well-settled law, default judgments are not ordinarily given preclusive effect in subsequent court proceedings because no issue was 'actually litigated' in the earlier proceeding."] *Id.* at 799. Similarly, in *Davis v. Massey (In re Massey)* 228 B.R. 686 (Bankr. S.D. Ind. 1998), the Court held that

> "Almost all courts hold that where there is a 'true default', i.e., the debtor made no appearance whatsoever in the prior proceeding, collateral estoppel should not be applied." *Id.* at 690.

Although a pre *Grogan* case, in the Third Circuit, *Matter of McMillan*, 579 F. 2d 289 (3rd Cir. 1978) still stands for the proposition that collateral estoppel does not apply to a default judgment because it is not actually litigated.

"...because the bankrupts did not 'actually litigate' the Ocean County case, not even facts which were necessary to that judgment can collaterally estop them from relitigating the same issues in the bankruptcy case. This holding is consistent both with the general rules of collateral estoppel and with the federal policies in bankruptcy cases." *Id.* at 292.

B. Courts Of Appeal That Apply Marrese

The *Nourbakhsh* opinion is in general accord with the Fifth and Sixth Circuits. In *Garner v. Lehrer (Matter of Garner)* 56 F. 3d 677 (5th Cir. 1995), the court applied the *Marrese* analysis to conclude that under Texas law, collateral estoppel bars relitigation of a state court default judgment for fraud in a subsequent nondischargeability proceeding. *Id.* at 679-680. Although the *Garner* court found that there is not an implied repeal of §1738 in the context of a nondischargeability proceeding (*Id.* at 681), *Garner* did not involve a "true default judgment." The defendant had answered the complaint and a trial ensued in which plaintiff " . . . put on evidence sufficient to carry his burden of proof. *Id.* at 680. The judgment was described as a " ' post-answer 'default' judgment. (citation omitted) *Id.* at 680.

Of importance, however, is the fact the court cited Restatement (Second) of Judgments §27 cmt. d (1982) as authority for the proposition that: ("when an issue is properly raised, by the pleadings or otherwise, and is submitted for determination and is determined, the issue is actually litigated."). *Id.* at 680. The

Restatement also provides, however, that true default judgments do not meet the "actually litigated" requirement. Restatement, supra, §27 at 256-257.

In the Sixth Circuit, *Bay Area Factors v Calvert (In re Calvert)*,105 F. 3d 315 (6th Cir. 1997) relied on *Marrese* to hold that California law gives preclusive effect to default judgments. *Id.* at 318. Applying the second prong of *Marrese*, the court held that neither the Bankruptcy Code nor legislative history suggests that Congress intended an exception to §1738 for true default judgments. *Id.* at 322.

The Ninth Circuit concluded that since *Grogan* held that collateral estoppel principles apply in discharge exception proceedings, then *a fortiori*, there is no exception to the full faith and credit statute. *Nourbakhsh, supra* at 801. *Calvert*, however, rejected the Ninth Circuit's reliance on *Grogan*, pointing out that the Supreme Court " . . . did not decide the narrower question of whether collateral estoppel also applies to default judgments." *Id.* at 318. As discussed above, the Grogan court did not address §1738, and therefore, did not discuss whether there was an exception to the full faith and credit statute.

C. Implied Repeal to §1738

Assuming the default judgment would be given preclusive effect under the second prong of *Mareese*, the framework requires a determination of whether there has been a partial repeal of §1738. Where there is no express repeal, any modification of §1738 must be implied. *Matsushita, supra* at 881. In deciding whether there is an implied repeal to §1738, the

"... general question is whether the concerns underlying a particular grant of exclusive jurisdiction justify a finding of an implied partial repeal of §1738. Resolution of this question will depend on the particular federal statute as well as the nature of the claim or issue involved in the subsequent federal action.... The primary consideration must be the intent of Congress." *Marrese, supra* at 386.

In *Brown, supra*, this Court specifically recognized that the 1970 amendments to §17 now (§523) embodied the intent of Congress that state judgments would not have claim preclusion effect on dischargeability issues in bankruptcy. *Brown , supra* at 135-136. This Court has reaffirmed this holding in *Matsushita, supra.*

"As a historical matter, we have seldom, if ever, held that a federal statute impliedly repealed §1738. [citations omitted] The rarity with which we have discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an "'irreconcilable conflict'" between the two federal statutes at issue. [citation omitted] But cf. *Brown v. Felson*, 442 U.S. 127, 138-139, 99 S. Ct. 2205, 2212-2213, 60 L. Ed. 2d 767 (1979) (declining to give claim preclusive effect to prior state court debt collection proceeding in federal bankruptcy suit, without discussing

§1738, state law or implied repeals). "*Id.* at 380- 381.

The Brown holding provides a basis for the argument that congress implicitly repealed the full faith and credit statute in the context of applying claim preclusion or issue preclusion to state court default judgments in certain dischargeability proceedings. This congressional grant of exclusive bankruptcy jurisdiction, coupled with the articulated Congressional policy to provide a fresh start for the honest, but unfortunate debtor, presents an "irreconcilable conflict" with the application of the full faith and credit statute to state court default judgments. No Supreme Court decision has questioned the continuing viability of *Brown* including this Court's decision in *Grogan.* In *Nourbakhsh, supra,* the Court's conclusion that *Brown* was a res judicata case, and therefore, is not an exception to §1738 when the issue is collateral estoppel fails to recognize the semblance. Applying collateral principles to a true default is, in effect, the same as applying res judicata.

> "...the principles and considerations which led to the Supreme Court's decision in *Brown* also mandate a similar exception in the area of collateral estoppel when nothing was actually litigated by the state court tribunal." *In re Wald, supra* at 551

III.
APPLYING THE FEDERAL RULE OF COLLATERAL ESTOPPEL IS REQUIRED TO COMPLY WITH THE U.S. CONSTITUTION

Article 1, §8, cl. 4 of the United States Constitution provides that the power is vested in Congress "to establish ... uniform laws on the subject of bankruptcies throughout the United States." This Court has discussed the constitutionality of state laws affecting bankruptcy.

In *Hanover National Bank v Moyses*, 186 U.S. 181 (1902) the court addressed whether application of state exemption laws to a bankrupt violated the constitutional provision for uniform laws on the subject of bankruptcies throughout the United States. The court held that the required uniformity is geographical and not personal. *Id.* at 188. The court went on to hold that in a constitutional sense, the system is uniform throughout the United States, because the property the trustee takes in each state is the same as would have been available to creditors absent the bankruptcy laws. "The general operation of the law is uniform although it may result in certain particulars differently in different states." *Id.* at 190.

Similarly, in *Stellwagen v. Clum*, 245 U.S. 605 (1918), the court held that congress may recognize

> ". . . the laws of the several states affecting dower, exemptions, the validity of mortgages, priorities of payment and the like. Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act,

> although in these particulars the preparation of the act is not alike in all the States." *Id.* at 613.

Application, however, of the full faith and credit statute, requiring bankruptcy courts to apply the state law of collateral estoppel leads to inconsistent results within a state. This inconsistency violates the Constitution's mandate for uniform laws on the subject of bankruptcies.

In re Wald, supra, contains a collection of cases where lower state appellate courts are in conflict as to whether collateral estoppel applies to a default judgment. The *Wald* court noted that "[v]ery few state appellate courts and fewer state courts of last resort have clearly decided the issue." *Id.* at 537. Thus, it is a difficult or impossible task for bankruptcy courts to discern whether a default judgment satisfies the "actual litigation" requirement. *Id.* at 539 n. 26. "The problem is real when consideration is given to the fact that courts of the same district often adopt conflicting interpretations of the same state laws." *Id.* at 549. [See, *Stokes v. Vierra (In re Vierra),* 173 B.R. 417 (Bankr. N.D. Cal. 1994) - the district court disagreed with the bankruptcy court's determination that under South Carolina law, a default judgment must be accorded collateral estoppel effect.]

Even in California, the issue is not crystal clear.

> "While the question is a close one and the California authorities are less than clear, the court believes that Fitzgerald has not been disapproved and ...a California court would apply California law to bind

> Defendant as to the matters necessarily decided that resulted in the Default Judgment. *Newsom v. Moore (In re Moore),* 186 B.R. 962,971 (Bankr. N.D. Cal. 1995)' " *Wald, supra,* at 539 n. 26.

The only way to ensure the application of uniform bankruptcy laws within a state is to apply the federal rule of collateral estoppel. Chief Justice Burger, in his concurring opinion in *Marrese* recognized that state law may be indeterminate on a claim or issue preclusion subject; and therefore

> " . . . it may be consistent with §1738 for a federal court to formulate a federal rule to resolve the matter . . . . Given the insubstantiality of the state interests and the weight of the federal interests, a strong argument could be made that a federal rule would be more appropriate than a creative interpretation of ambiguous state law." *Marrese, supra,* 470 U.S. at 390.

Accordingly, application of the federal rule of issue preclusion is consistent with the principles set forth in Brown; it is consistent with Grogan; it ensures compliance with the U.S. Constitution; and it does not offend the principle of collateral estoppel - " . . . to relieve parties of the cost and vexation of multiple lawsuits and [conservation of] judicial resources." *In re Bugna,* 33 F. 3d 1054,1056 (9th Cir. 1994).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOT FOR PUBLICATION | Filed: 6/12/00

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In Re EDWARD E. LITWAK, aka ED LITWAK,

Debtor.

NO: 99-55678

BAP No. SC-98-01452-RyGJ

ORDER

EDWARD E. LITWAK, aka ED LITWAK,

Appellant,

vs.

OSCAR PRODUCTIONS, INC.; JENNIFER O'NEILL,

Appellees.

Before: SCHROEDER, BEEZER, and TROTT, Circuit Judges.

The Panel as constituted above has voted to deny the petition for rehearing. Judges Schroeder and Trott have voted to deny the petition for rehearing en banc, and Judge Beezer so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing, and the petition for rehearing en banc, are DENIED.

NOT FOR PUBLICATION

Filed: 5/2/00

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In Re EDWARD E. LITWAK, aka ED LITWAK,

Debtor.

NO: 99-55678

BAP No. SC-98-01452-RyGJ

MEMORANDUM[1]

EDWARD E. LITWAK, aka ED LITWAK,

Appellant,

vs.

OSCAR PRODUCTIONS, INC.; JENNIFER O'NEILL,

Appellee.

Appeal from the Ninth Circuit

Bankruptcy Appellate Panel

Ryan, Greenwald, Jones, Judges, Presiding

Argued and Submitted April 12, 2000

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

San Francisco, California

Before: SCHROEDER, BEEZER, AND TROTT, Circuit Judges

Edward E. Litwak ("Litwak") appeals the Bankruptcy Appellate Panel's ("BAP") decision affirming the bankruptcy court's grant of summary judgment in favor of Oscar Productions, Inc. and Jennifer O'Neill (collectively "Appellees") on their claim of nondischargeability under 11 U.S.C. section 523(a)(2)(A) and (a)(6). Litwak argues that the bankruptcy court erred by giving collateral estoppel effect to a state court default judgment for fraud. This court has jurisdiction under 28 U.S.C. section 158(d) and we AFFIRM.

The parties are familiar with the facts of this case and, therefore, we will not reiterate them here. Because this court is in as good a position as the BAP to review the decision of the bankruptcy court, we review the bankruptcy court's decision independently. Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800, (9th Cir. 1995). The bankruptcy court's grant of summary judgment is reviewed de novo. Id. In deciding whether summary judgment was appropriate, we must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the bankruptcy court applied the relevant substantive law See Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998).

Litwak contends that the bankruptcy court erred in giving collateral estoppel effect to the state court default judgment because (1) the federal, rather than the state, rule of collateral estoppel applies, and (2) an exception to the full faith and credit statute applies based on the strong federal policy of a fresh start for the honest, but unfortunate, debtor. We reject Litwak's arguments, however, because they squarely contradict

this court's holding in Gayden v. Nourbakhsh. In Nourbakhsh, the court held that in order to determine the preclusive effect of a state court judgment in a subsequent federal lawsuit, courts must decide (1) whether, under the applicable state law, the state court judgment should be given collateral estoppel effect, and (2) if so, whether an exception to the full faith and credit statute should apply. Nourbakhsh, 67. F.3d at 800 (citing Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 381-83 (1985)). Applying this framework, the Nourbakhsh court first determined that, under Florida law, the default judgment against the debtor would be given collateral estoppel effect. Id. at 800-01. Then, relying on Grogan v. Garner, 498 U.S. 279 (1991), the court concluded that there was no applicable exception to the full faith and credit statute. Id. at 801. Accordingly, the Nourbakhsh court held that the Florida state court default judgment should be given collateral estoppel effect in the subsequent bankruptcy proceeding. Id.

Here, the issues are the same as those presented in Nourbakhsh, and Litwak advances the same arguments as the debtor in that case. Moreover, like Florida, California law provides that courts should give collateral estoppel effect to a state court default judgment. See Four Star Elec., Inc. v. F & H Constr., 7 Cal. App. 4th 1375, 1380 (1992); Fitzgerald v. Herzer, 78 Cal. App. 2d 127, 131-32 (1947) ("A judgment by default is as conclusive as to the issues tendered by the complaint as if it had been rendered after answer filed and trial had on allegations denied by the answer. Such a judgment is res judicata as to all issues aptly pleaded in the complaint and defendant is estopped from denying in a subsequent action any allegations contained in the former complaint.") (internal citations omitted); see also Younie v. Gonya (In re Younie), 211 B.R. 367, 375 (9th Cir. BAP 1997) (holding that in California a default judgment satisfies the actually litigated" requirement for the application of collateral

estoppel), aff'd, 163 F.3d 609 (9th Cir. 1998). Thus, Nourbakhsh is on all fours with this case, which ends our inquiry. "A three judge panel is bound by a prior judgment of this court unless the case is taken en banc and the prior decision is overruled. Roundy v. Commissioner, 122 F.3d 835, 837 (9th Cir. 1997).

AFFIRMED.

Filed: 5/2/00

UNITED STATES BANKRUPTCY APPELLATE

PANEL OF THE NINTH CIRCUIT

In Re EDWARD E. LITWAK, aka ED LITWAK,	BAP No. SC-98-01452-RyGJ
Debtor.	Bk No: 97-16497-H7
	Adv. No. 98-90009-H7
	MEMORANDUM[1]

EDWARD E. LITWAK,

Appellant,

vs.

OSCAR PRODUCTIONS, INC.; JENNIFER O'NEILL,

Appellees.

Argued and submitted on December 3, 1998 at San Diego, California Filed March 2, 1999

Appeal from the United States Bankruptcy Court for the Southern District of California

Honorable John J. Hargrove, Bankruptcy Judge, Presiding

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrine of law of the case, res judicata, or collateral estoppel . See BAP Rule 13 & Ninth Circuit Rule 36-3.

Before: RYAN, GREENWALD[2] and JONES, Bankruptcy Judges

A state court default judgment (the "Default Judgment") was entered against appellant Edward E. Litwak ("Debtor") on fraud and intentional infliction of emotional distress causes of action. Debtor subsequently filed a chapter 7[3] bankruptcy petition. Judgment creditors Oscar Productions, Inc. (f/s/o Jennifer O'Neill) and Jennifer O'Neill ("Appellees") then filed a motion for summary judgment (the "Motion") based on the Default Judgment arguing that collateral estoppel precluded relitigation of the fraud cause of action under section 523(a)(2) and the intentional infliction of emotional distress cause of action under section 523(a)(6). The bankruptcy court granted the Motion and Debtor appeals. We AFFIRM.

I. FACTS

The facts are undisputed. On August 14, 1992, Appellees filed an action against Debtor in state court for conspiracy, fraudulent inducement to contract, negligent misrepresentation, bad faith denial of contract, bad faith denial of agency, breach of contract, and intentional infliction of emotional distress. Debtor failed to answer the state court complaint and the state court entered a default against him.

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[2] Hon. Arthur M. Greenwald, Bankruptcy Judge for the Central District of California sitting by designation.

[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. section 101-1330 and the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

Appellees requested that the state court entered a default judgment on the fraud and intentional infliction of emotional distress claim only. In March, 1997, the state court entered the Default Judgment against Debtor in the amount of $8,480,741.40 plus interest at the legal rate.

Debtor failed to appeal the Default Judgment which has since become final.

On November 5, 1997, Debtor filed a chapter 7 bankruptcy petition. Appellees filed the Complaint based upon the Default Judgment. In April, 1998, Appellees filed the Motion asserting that the Default Judgment was entitled to collateral estoppel application. On May 26, 1998, a hearing on the Motion was held and on June 11, 1998, the bankruptcy court entered an order (the "Order') granting the Motion. The court found that the Default Judgment for fraud and intentional infliction of emotional distress necessarily determined that the debt was obtained by fraud and was based on willful and malicious injury for purposes of section 523(a)(2)(A) and (a)(6) respectively. Thus, the court determined that collateral estoppel precluded the relitigation of these issues. Debtor timely filed a notice of appeal.

II. ISSUES

A. Whether the bankruptcy court erred in granting the Motion on the basis that the Default Judgment was entitled to collateral estoppel application in California.

B. Whether the Rooker-Feldman doctrine precludes Debtor from challenging the validity of the Default Judgment.

III. STANDARD OF REVIEW

We review rulings on summary judgment de novo. See Bank of Los Angeles v. Official PACA Creditor's comm. (In re Southland+Keystone), 132 B.R. 632, 637 (9th Cir. BAP 1991). Similarly, we review the bankruptcy court's application of collateral estoppel de novo. See Gayden v. Nourbakhsh (In re Nourbakhsh), 67. F3d 798, 800 (9th Cir. 1995).

IV. DISCUSSION

A. The Bankruptcy Court Correctly Held That the Default Judgment was Entitled to Collateral Estoppel Application.

The bankruptcy court, relying on Ninth Circuit holding in Nourbakhsh, 67 F.3d at 801, and our holding in Younie v. Gonya (In re Younie), 211 B.R. 367, 374-75 (9th Cir. BAP 1997), aff'd, 163 F.3d 609 (9th Cir. 1998), held that the Default Judgment was entitled to collateral estoppel application in California. Debtor argues that the bankruptcy court erroneously gave collateral estoppel application to the Default Judgment because: (1) Nourbakhsh was incorrectly decided; and (2) giving collateral estoppel effect to a default judgment violates fundamental policy of bankruptcy law – to give an honest but unfortunate debtor a fresh start. We reject Debtor's assertions.

Under the Full Faith and Credit Statute, 28 U.S.C. section 1738, a federal court "must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered.'"

Under the Full Faith and Credit Statute, 28 U.S.C. section 1738, a federal court "must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered.'" Younie, 211 B.R. at 373 (quoting Migra v. Warren City School Dist. Bd. Of Educ., 465 U.S. 75, 81 (1984)). Collateral estoppel applies in dischargeability proceedings in bankruptcy. See Grogan v. Garner, 498 U.S. 279, 284-85 & n.11 (1991). Under California law, collateral estoppel is satisfied when the issue sought to be precluded from relitigation: (1) is identical to the issue decided in the former proceeding; (2) was actually litigated in the former proceeding: (3) was necessarily decided in the former proceeding; (4) resulted in a final judgment on the merits; and (5) involves the same party or a party in privity to the party in the former proceeding. See Younie, 211 B.R. at 373 (citing Kelly v. Okoye (In re Kelly), 182 B.R. 255, 258, (9th Cir. BAP 1995), aff'd, 100 F.3d 110 (9th Cir. 1996)). Here, Debtor only challenges the actually litigated prong of collateral estoppel.

We have decided the identical issue of whether a California default judgment was actually litigated for purposes of collateral estoppel. Id. at 375. In Younie, a judgment creditor filed a complaint in a California trial court against the debtors alleging fraud and intentional misrepresentation, negligent misrepresentation, and breach of contract. Id. at 370. The debtors failed to answer the complaint, and a default judgment was entered. The debtors filed a chapter 7 bankruptcy petition, and the creditor brought a nondischargeabiltiy action alleging that the debt arising from a state court default judgment was nondischargeable under section 523(a)(2)(A) or (a)(6). The creditor then filed a

summary judgment motion, invoking the application of collateral estoppel. The bankruptcy court granted the motion and the debtor appealed.

We affirmed. First, we recognized the Ninth Circuit's holding in Nourbakhsh[4] that "the bankruptcy

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[4] The thrust of Debtor's argument is that Nourbakhsh was wrongly decided. At the hearing on the Motion, the following colloquy occurred:

THE COURT: OKAY. MR. SMYLIE, I READ YOUR CLAIMS AND WHAT YOU SEEM TO BE DOING IS REALLY ATTACKING NINTH CIRCUIT AUTHORITY. NOT SO MUCH THE COURT'S AUTHORITY. BUT WHAT YOU'RE BASICALLY SAYING, FOR EXAMPLE, I SHOULDN'T GRANT THE SUMMARY JUDGMENT MOTION BECAUSE I GUESS THE CASE WASN'T ACTUALLY LITIGATED?

MR. SMYLIE: [DEBTOR'S ATTORNEY]: CORRECT.

THE COURT: YOU'RE CHALLENGING [NOURBAKHSH] ... AND SOME OF THE OTHER NINTH CIRCUIT [sic] IN THAT CASE. IS THAT THE THRUST OF THE ARGUMENT?

MR. SMYLIE: YES, ESSENTIALLY IT IS, YOUR HONOR. I GUESS THE POINT IS TO SOME EXTENT, I THINK THOSE CASES ARE DISTINGUISHABLE BECAUSE IN ANALYZING GROGAN, I DON'T THINK EITHER CASE CITED TO GROGAN'S STATEMENT IN THE CASE WHEN IT SAID THE [sic] COLLATERAL ESTOPPEL APPLIED.

THE COURT: YEAH, BUT I'M LOOKING AT THE NINTH CIRCUIT... YOU'VE RAISED LEGAL ARGUMENTS, BUT I'M BOUND BY THE CIRCUIT AND I'M BOUND BY THE [BANKRUPTCY APPELLATE PANEL]., IN MY VIEW.

MR. SMYLIE: TO BE INTELLECTUALLY HONEST WITH THE COURT, I UNDERSTAND THE POSITION. I SUPPOSE THAT MY VIEW IS THE SAME AS JUDGE RUSSELL IN HIS DISSENTING OPINION IN [NOURBAKHSH]. I THINK THE CASE WAS

court had to give collateral estoppel effect to a state court default judgment when the state in which the judgment was rendered would do so." Id at 374 (citing Nourbakhsh, 67 F.3d at 801). We then noted that in California, a default judgment satisfied the "actually litigated" requirement of collateral estoppel. Id. at 375 (citing Lake v. Capps (In re Lake), 202 B.R. 751, 757 &n.6 (9th cir. BAP 1996); Green v. Kennedy In re Green), 198 B.R. 564, 566 (9th Cir. BAP 1996) (holding that a default judgment entered after the defendant's answer was stricken was entitled to collateral estoppel effect) (Citing Four Star Elec., Inc. v. F&H Constr., 10 Cal. Rptr. 2d 1, 5 (Ct. App. 1992))).

Debtor does not cite to any statutory or case law that has overruled Nourbakhsh or Younie[5]. Indeed, the Ninth Circuit recently reaffirmed the vitality of Nourbakhsh when it affirmed our holding in Younie. Accordingly, we conclude that the bankruptcy court did not err in holding that the Default Judgment must be given collateral estoppel effect.

B. The Rooker-Feldman Doctrine Precluded Review of the Default Judgment.

Debtor also argues that the Default Judgment was erroneous and challenges the facts asserted in the state court complaint. Debtor was barred from

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WRONGLY CITED [sic]... Reporter's Tr. Of Proceedings (May 26, 1998) at 3-7.

[5] Debtor only argues that the Code or the fundamental policy of bankruptcy provides an exception to or implied repeal of the Full Faith and Credit provision. However, the Ninth Circuit considered and rejected an identical argument. See Nourbakhsh, 67 F.3d at 801.

challenging the validity of the Default Judgment in the bankruptcy court. The United States Supreme Court has held that federal district courts lack subject matter jurisdiction to hear collateral attacks on state court judgments or to review final determinations of state court decision. See District of Columbia Court of Appeals v. Feldman, 460, U.S. 462 (1983); Rooker v. Fidelity Trust co., 263 U.S. 413 (1923). This legal concept has come to be known as the Rooker-Feldman doctrine. See Audre, Inc. v. Casey (In re Audre, Inc., 216 B.R. 109, 26 (9th Cir. BAP 1997). In Feldman, the Court recognized that 28 U.S.C. section 1257 only permitted the United States Supreme Court, and no other federal court, to review final decisions of state courts. See Audre, 216 B.R. at 26 (citing Worldwide Church of God v. McNair, 805 F.2d 888, 890 (9th Cir. 1986); Dubinka v. Judges of Superior Court, 23 F.3d 218, 221 (9th Cir. 1994)).

In Audre, we held that the Rooker-Feldman doctrine prevented the bankruptcy court from disallowing a claim based on a California family court judgment. Id. at 31. We noted that the doctrine has been applied in bankruptcy courts, Id. at 26, and "applies to judgment from any state court, regardless of whether the judgment is on appeal." Id. at 28 (citing Worldwide Church, 805 F.2d at 893).

However, we recognized in dictum that a bankruptcy court can intervene in a state court judgment "if the state proceeding were void ab initio; a void judgment being one which from its inception was a complete nullity and without legal effect. Id. (citing James v. Draper (In re James), 940 F.2d 46, 52 (3rd Cir. 1991)). Absent such a finding, the Rooker-Feldman doctrine applies "even where a state court judgment

may be in error." Id. at 29 (citing In re Highway Truck Drivers and Helpers, Teamsters Local No. 107, 100 B.R. 2009, 21`76 (Bankr. E.D. Pa. 1989)).

Here, Debtor does not argue that the state court was without jurisdiction to render the Default Judgment. Rather, he argues that he had no knowledge that the Default Judgment had been entered until Fall 1997. However, because Debtor failed to appeal the Default Judgment, the Default Judgment is final and could only be challenged in the state court by filing a motion for reconsideration. Consequently, Debtor was precluded from challenging the validity of the Default Judgment in the bankruptcy court.

V. CONCLUSION

In sum, the bankruptcy court did not err when it granted the Motion on the basis that the Default Judgment was entitled to collateral estoppel application. We are bound by Nourbakhsh, Younie and other precedential authority for the proposition that default judgments satisfy the actually litigated prong of collateral estoppel in California.

Additionally, the Rooker-Feldman doctrine precluded Debtor from challenging the validity of the Default Judgment in the bankruptcy court.

Accordingly, we AFFIRM.

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Entered 7/11/98
Filed: 6/9/98

Attorneys for Plaintiffs
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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In Re EDWARD E. LITWAK, aka EDLITWAK ANDERSON, aka ED LITWAK,

Debtor.

CASE NO: 97-16497-JH
[Chapter 7]

ADV. PROC. NO: 98-90009

JUDGMENT

(Filed concurrently with Proposed Order and Findings of Fact and Conclusions of Law)

Chapter 7 Case Filed: 11/5/97
Adv. Proc. Filed: 1/8/98

Date: May 26, 1998
Time: 10:30 a.m.
Dept: 3
Room 129

OSCAR PRODUCTIONS, INC. (f/s/o) Jennifer O'Neill) and JENNIFER O'NEILL, an individual,

Plaintiffs

vs.

EDWARD E. LITWAK, an individual,

Defendant.

IT IS ORDERED, ADJUDGED, AND DECREED THAT:

Plaintiffs' state court judgement dated March 17, 1997, L.A.S.C. Case No.. BC062132, is non-dischargeable in the amount of $8,480,741.40, together with interest at the legal rate of 10 percent per annum since March 17, 1997. Plaintiffs shall recover from Defendant Litwak their costs of suit in the amount of $_____.

Dated: 6/9/98

"S/"
Judge, U.S. Bankruptcy Court

Signature by the attorney constitutes a certification under Fed. R. Bankr. P. 9011 that the relief provided by the order is the relief granted by the court.

Submitted by:

REUBEN & NOVICOFF

By: "S/"
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Approved as to form and content:

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Entered: 6/11/98
Filed: 6/9/98

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In Re EDWARD E. LITWAK, aka EDLITWAK ANDERSON, aka ED LITWAK,	CASE NO: 97-16497-JH [Chapter 7]
Debtor.	ADV. CASE NO. 98-90009
OSCAR PRODUCTIONS, INC. (f/s/o) Jennifer O'Neill) and JENNIFER O'NEILL, an individual,	[PROPOSED] ORDER AND FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed concurrently with Proposed Judgment
Plaintiffs	Chapter 7 Case Filed: 11/5/97 Adv. Proc. Filed: 1/8/98
vs.	Date: May 26, 1998 Time: 10:30 a.m.
EDWARD E. LITWAK, an individual,	Dept: 3 Room 129
Defendant.	

The motion of plaintiffs Oscar Productions, Inc. and Jennifer O'Neill for Summary Judgment on their Complaint to Determine Non-Dischargeability of Debt came on regularly for hearing on May 26, 1998, in Department 3, Room 129 of this court, the Honorable John J. Hargrove, Judge Presiding. Stephen L. Raucher of Reuben & Novicoff appeared on behalf of the moving parties; Scott A. Smylie appeared on behalf of the debtor/defendant Edward E. Litwak.

Having reviewed the moving and opposing papers, and having considered the arguments of counsel, the court determines as follows:

FINDINGS OF FACT

1. On August 14, 1992, Plaintiffs brought an action in the Los Angeles County Superior Court against Defendant Edward E. Litwak for Conspiracy, Fraudulent Inducement to Contract, Negligent Misrepresentation, Bad Faith Denial of Contract, Bad Faith Denial of Agency, Breach of Contract, and Intentional Infliction of Emotional Distress. (Oscar Productions, Inc. v. Paolo Gucci, et al.) L.A.S.C. Case No. BC 062132). On October 21, 1992, Plaintiffs filed a substantially identical First Amended Complaint. (Exhibit A to Plaintiffs' Request for Judicial Notice, filed in support of their motion for summary judgment.)

2. Defendant Litwak failed to answer the First Amended Complaint, and the court entered a default against him on January 11, 1993. (Exhibit B to Request for Judicial Notice.)

3. Plaintiffs subsequently requested the entry of default judgment on the fraud and intentional infliction of emotional distress claims alone,

submitting their evidence on March 10, 1997. (Exhibit C to Request for Judicial Notice.)

4. On March 17, 1997, the court entered a Judgment against Defendant Litwak on the fraud and intentional infliction of emotional distress claims in the amount of $6,250,000.00, plus $2,230,559.40 in prejudgment interest, and costs of $182.00, for a total amount of $8,480,741.40, together with interest as provided by law. (Exhibit E to Request for Judicial Notice.) That Judgment is now final.

5. On November 5, 1997, Defendant Litwak filed a voluntary petition for bankruptcy relief under Chapter 7 of the bankruptcy code.

6. On January 8, 1998, Plaintiffs filed a Complaint to Determine Non-Dischargeability of Debt under 11 U.S.C. section 523(a)(2)(A) and 11 U.S.C. section 523(a)(6), based upon their state court judgment against Defendant Litwak.

Based upon the foregoing Findings of Fact, the Court now makes its:

CONCLUSIONS OF LAW

7. Plaintiffs' state court judgment against Defendant Litwak for fraud and intentional infliction of emotional distress necessarily determined that the debt owing to Plaintiffs was obtained by means of fraud, and is based on willful and malicious injury.

8. Defendant Litwak is therefore collaterally estopped in this Dischargeability proceeding from relitigating the issues of fraud and willful and malicious injury. In re Nourbakhsh, 67 F.3d

798 (9th Cir. 1995); In re Younie, 211 B.R. 367 (9th Cir. BAP 1997).

9. The entire debt of Defendant Litwak owing to Plaintiffs is non-dischargeable as a matter of law under 11 U.S.C. section 523(a)(2)(A) and 11 U.S.C. section 523(a)(6).

10. Defendant Litwak's opposition did not raise a triable issue with respect to any of the material facts set forth above. Summary judgment therefore must be entered in favor of Plaintiffs against Defendant Litwak on the Complaint to Determine Non-Dischargeability of Debt.

11. Accordingly, Plaintiffs' Motion for Summary Judgment is GRANTED. IT IS ORDERED that Plaintiffs' state court judgment dated March 17, 1997, L.A.S.C. Case No. BC 062132, is non-dischargeable in the amount of $8,480,741.40, together with interest at the legal rate of 10 percent per annum since March 17, 1997. IT IS FURTHER ORDERED that Judgment be entered in this action in favor of Plaintiffs and against Defendant Litwak.

Dated: 6/9/98

"S/"
Judge, US. Bankruptcy Court

Signature by the attorney constitutes a certification under Fed. R. Bankr. P. 9011 that the relief provided by the order is the relief granted by the court.

Submitted by:

REUBEN & NOVICOFF

By: "S/"
Stephen L. Raucher
Attorneys for Plaintiffs Oscar Productions, Inc. and Jennifer O'Neill

Approved as to form and content:

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By: "S/"
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Supreme Court, U.S.
FILED
OCT 26 2000
OFFICE OF THE CLERK

(2)

No. 00-501

IN THE

Supreme Court of the United States

EDWARD E. LITWAK,

Petitioner,

v.

OSCAR PRODUCTIONS, INC., (f/s/o Jennifer O'Neill) and JENNIFER O'NEILL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent Oscar Productions, Inc. is a privately held corporation, and no parent or publicly held company owns ten percent or more of the corporation's stock.

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SUMMARY OF ARGUMENT

In *Grogan v. Garner*, 498 U.S. 279, 111 S. Ct. 654 (1991) and *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 105 S. Ct. 1327 (1985), this Court established the framework for analyzing the issue presented on this Petition — that is, whether state default judgments must be given collateral estoppel effect in accordance with the Full Faith and Credit statute in bankruptcy nondischargeability proceedings. Each of the circuits that has applied this framework has arrived at the same conclusion: there is no justification for departing from the Full Faith and Credit statute in the context of default judgments, particularly in light of this Court's express holding in *Grogan* that collateral estoppel principles apply in nondischargeability proceedings. Moreover, requiring bankruptcy courts to apply state principles of collateral estoppel is in no way unique and does not offend Congress' power to establish uniform laws on the subject of bankruptcy. Accordingly, Litwak's Petition for Writ of Certiorari raises no issue requiring resolution by this Court, and it should be denied.

STATEMENT OF THE CASE

A. Factual Background

Respondent Jennifer O'Neill is a world-renowned professional actress and spokesperson. For nearly three decades prior to 1991, she was a spokesperson for Proctor & Gamble's "Cover Girl" line of cosmetics. Ms. O'Neill starred in more than thirty feature films, including "Summer of '42," as well as numerous television movies and three television series. Oscar Productions, Inc. is Ms. O'Neill's personal services corporation.

When Ms. O'Neill's unprecedented relationship with "Cover Girl" came to an end in 1991, she began to investigate other endorsement opportunities. In August of 1991, Ms. O'Neill was approached with the possibility of representing and endorsing Paolo Gucci products. Subsequently, she met petitioner Edward Litwak. Litwak represented that he was Paolo Gucci's current licensing agent and had served in that capacity for the previous ten years. Litwak further represented that he was specifically authorized by Gucci to negotiate and finalize an endorsement agreement.

On October 23, 1991, Oscar Productions (for the services of Jennifer O'Neill) and Paolo Gucci, M.J. Knoud, Inc., Paolo Gucci Licenses and Paolo Gucci Designs entered into a spokesperson and endorsement agreement ("the Agreement"). Litwak executed the Agreement "as Licensing Agent for Paolo Gucci, M.J. Knoud, Inc., Paolo Gucci Licenses and as Chief Executive Officer of Paolo Gucci Designs." Pursuant to the Agreement, Ms. O'Neill committed to endorse certain of Gucci's services and products for a term of five (5) years in consideration of the payment of $6,250,000. In light of the negotiations and eventual Agreement, Ms. O'Neill did not pursue any other endorsement opportunities, although she was at the time in an excellent position to do so, given her then-recent and long-standing relationship with "Cover Girl."

Under the terms of the Agreement, the first payment of $250,000 was to be made on November 1, 1991. However, that payment was never made. Litwak repeatedly assured the respondents that the Agreement would be honored and that he would personally put up the money for the first $250,000 payment if necessary. None of these promises were fulfilled. The respondents continued to attempt to work with Litwak for approximately another month, to no avail.

Finally, on January 23, 1992, Litwak sent Ms. O'Neill a letter in which he denied that he ever had any authority to act on behalf of Gucci. He further admitted in that letter that his "actions in signing [the Agreement] in this matter was [sic] totally improper and wrongful."

B. Procedural Background

On August 14, 1992, Oscar Productions, Inc. and Jennifer O'Neill brought an action in the Los Angeles County Superior Court against Edward E. Litwak for Conspiracy, Fraudulent Inducement to Contract, Negligent Misrepresentation, Bad Faith Denial of Contract, Bad Faith Denial of Agency, Breach of Contract, and Intentional Infliction of Emotional Distress. On October 21, 1992, the respondents filed a substantially identical First Amended Complaint.

Litwak failed to answer the First Amended Complaint, and the state court entered a default against him on January 11, 1993. In accordance with California law, a copy of the Request for Entry of Default was served on Litwak at his last known address. Moreover, Litwak appeared for deposition in the state court action on February 17 and 18, 1993 pursuant to subpoena, and he admits that he knew at that time that his default had been entered. Nonetheless, Litwak never made *any effort* to have his default set aside.

In accordance with California law, the respondents subsequently requested the entry of a default judgment on the fraud and intentional infliction of emotional distress claims alone, submitting their evidence on March 10, 1997. On March 17, 1997, the Superior Court entered a judgment against Litwak on the fraud and intentional infliction of

emotional distress claims in the amount of $6,250,000, plus $2,230,559.40 in prejudgment interest, and costs of $182, together with interest as provided by law. No appeal was taken from the judgment, which became final on September 13, 1997, pursuant to California Rule of Court 2(a).

On November 5, 1997, after the respondents began execution proceedings, Litwak filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code, seeking to discharge the debt. The respondents commenced an adversary proceeding on January 8, 1998, to determine the non-dischargeability of the debt arising out of their state court judgment, pursuant to 11 U.S.C. §§ 523(a)(2)(A) (fraud) and 523(a)(6) (willful and malicious injury).

The respondents then filed a motion for summary judgment in the adversary proceeding based upon the California state court default judgment for fraud and intentional infliction of emotional distress. On May 26, 1998, the Bankruptcy Court granted the respondents' Motion for Summary Judgment, determining that it was required to give collateral estoppel effect to the respondents' state court judgment. The Bankruptcy Court subsequently entered its Order and Findings of Fact and Conclusions of Law on June 11, 1998.

Litwak then filed an appeal to the Bankruptcy Appellate Panel, claiming that the Bankruptcy Court erred in applying collateral estoppel. The Bankruptcy Appellate Panel affirmed the Bankruptcy Court's Order on March 2, 1999. Litwak next appealed to the Ninth Circuit Court of Appeals, which also affirmed the lower courts' rulings on May 2, 2000, citing this Court's decision in *Grogan*, *supra*, and *Maresse*, *supra*. Having failed to convince the Ninth Circuit to rehear the

case *en banc*, Litwak now seeks relief from this Court. However, Litwak has not raised any issue justifying review by this Court, and his Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Among The Circuits That Have Applied The Analytical Framework Established By This Court.

A. The Analytical Framework.

This Court conclusively established that the doctrine of collateral estoppel applies in bankruptcy dischargeability proceedings in *Grogan v. Garner*, 498 U.S. 279, 284-285 & n.11, 111 S. Ct. 654, 658 (1991). Citing its prior decisions, including *Brown v. Felson*, 442 U.S. 127, 139, 99 S. Ct. 2205, 2213 (1979), this Court stated, "we now clarify that collateral estoppel principles do indeed apply in discharge exception proceedings pursuant to § 523(a)." *Id.*

Moreover, as explained in *Grogan*, while "the issue of nondischargeability has been a matter of federal law governed by the terms of the Bankruptcy Code," "the validity of a creditor's claim is determined by rules of state law." *Id.* at 283-84. In other words, while the nature of claims that may be discharged is governed exclusively by 11 U.S.C. § 523, and only bankruptcy courts may determine which such claims are dischargeable, determinations as to the substance of those claims spring from state law.[1]

1. In this case, respondents obtained a judgment against Litwak for fraud and intentional infliction of emotional distress. Litwak (Cont'd)

This Court has also made clear that, in determining the effect of a state court judgment in a subsequent federal proceeding, federal courts must look to the law of the state in which the judgment was rendered in accordance with the Full Faith and Credit statute, 28 U.S.C. § 1738. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S. Ct. 1327 (1985). The Full Faith and Credit statute was enacted by the very first Congress, and requires that federal courts accord state judgments the same effect "as they have by law or usage in the courts of the state from whence the said records are or shall be taken." Thus, under *Grogan* and *Marrese*, collateral estoppel effect must be given to state default judgments in bankruptcy nondischargeability proceedings to the same extent such effect would be given by the state rendering the judgment, unless this Court finds that the Full Faith and Credit statue should be ignored.

Marrese dealt with the application of collateral estoppel to a federal suit for antitrust violations based on a previous state court judgment. Because antitrust matters are within the exclusive jurisdiction of federal courts, the plaintiffs claimed that an exception to the Full Faith and Credit statute applied to allow them to bring the subsequent federal action. This Court ruled that, in order to determine whether an exception to the Full Faith and Credit statute should apply, federal courts must follow a two-step process. *Marrese*, 470 U.S. at 381. First, a federal court must look to state law to

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(Cont'd)

does not dispute that the elements necessary to prove these claims under California law sufficed to support the finding that Litwak's debt was (1) obtained by "false pretenses, false representation, or actual fraud," and (2) "for willful and malicious injury by the debtor," and therefore nondischargeable under 11 U.S.C. §§ 523(a)(2)(A) and (a)(6).

determine the preclusive effect of the state court judgment. If state law would not bar re-litigation of an issue or claim decided in the earlier proceeding, then the inquiry ends. If state law would afford the judgment preclusive effect, however, the court must then determine whether Congress created an express or implied repeal of § 1738. Since it was unclear whether the state preclusion law at issue in *Marrese* would bar antitrust litigation in the subsequent federal proceeding, the Court declined to address whether an exception to § 1738 applied, instead remanding the matter. *Id.* at 383. The Court stated, however, that "the fact that petitioners' antitrust claim is within the exclusive jurisdiction of the federal courts does not necessarily make § 1738 inapplicable to this case." *Id.* at 380.

The Court did have occasion to apply the *Marrese* test in *Matsushita Elec. Indust. Co. v. Epstein*, 516 U.S. 367, 380-81, 116 S. Ct. 873 (1996). *Matsushita* involved shareholders who were parties to both a Delaware class action suit, which resulted in a settlement judgment, and a federal securities lawsuit in the Central District of California. The defendants in the federal suit asserted that further claims against them were barred by the Delaware judgment. The Ninth Circuit rejected this defense, holding that the state court judgment could not bar securities claims which were in the exclusive jurisdiction of the federal courts. This Court reversed.

The Court first found that, under Delaware law, the Delaware judgment had preclusive effect. The Court next found that the federal securities laws contained no express repeal of § 1738. Finally — and most importantly for purposes of Litwak's petition — the Court found that, notwithstanding the exclusive grant of federal jurisdiction

for claims under the Securities Exchange Act, the situation did not create an implied repeal of § 1738. The Court noted that such repeals are extremely rare: "as a historical matter, we have seldom, if ever, held that a federal statute impliedly repealed § 1738 . . . due to the relatively stringent standard . . . that there be an 'irreconcilable conflict' between the two federal statutes at issue." *Id.* at 380-81, citing *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S. Ct. 1883 (1982).

When *Marrese* and *Matsushita* are read together with *Grogan*, it becomes clear that nothing in the Bankruptcy Code either expressly or impliedly repeals § 1738 with respect to collateral estoppel determinations. Indeed, *Grogan* specifically requires that collateral estoppel effect be given to state court judgments in nondischargeability proceedings.[2] Thus, a default judgment must be given the same effect as it would receive under the law of the state in which it was rendered. Because this Court has already established the analytical framework requiring this result, there is no need to grant Litwak's petition.

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2. Litwak makes much of the *Grogan* court's citation to the Restatement (Second) of Judgments § 27, which it referenced for the proposition that, in order for a judgment to have collateral estoppel effect on subsequent claim, (1) the elements of the two claims must be identical, and (2) those elements must have been "actually litigated" and determined in the first action. Because the Restatement elsewhere adopts the federal interpretation of the term "actually litigated" as not applying to default judgments, Litwak argues that *Grogan* requires application of the federal rule. However, Litwak reads entirely too much into this citation to the Restatement. All states incorporate the requirements noted by *Grogan* into their definition of collateral estoppel; the distinction between states arises from varying interpretations of the term "actually litigated," an issue not before the *Grogan* court.

B. Uniform Application of the Analytical Framework by the Circuits.

All of the Circuits that have analyzed this issue under the framework established by this Court as it relates to default judgments have come to the conclusion that the Full Faith and Credit statute applies. Of most relevance to the decision below was the Ninth Circuit's decision in *In re Nourbakhsh*, 67 F.3d 798 (9th Cir. 1995). In *Nourbakhsh*, the plaintiffs filed an action against the defendant in Florida state court, alleging fraud and other claims. The defendant did not file an answer, and the Florida court entered a default judgment against him, including a specific finding of fraud. The defendant subsequently filed a petition for bankruptcy in the Southern District of California. The plaintiffs filed an adversary complaint to determine nondischargeability of their debt based upon the default judgment. Upon motion for summary judgment, the Bankruptcy Court held that the debt was nondischargeable, and the Bankruptcy Appellate Panel affirmed.

Explicitly following the framework of *Marrese*, the Ninth Circuit first determined that Florida gives collateral estoppel effect to default judgments. The court then noted that the "full faith and credit requirement of § 1738 compels a bankruptcy court in a § 523(a)(2)(A) nondischargeability proceeding to give collateral estoppel effect to a prior state court judgment." 67 F.3d at 801. Citing *Grogan*, the Ninth Circuit then expressly determined that *no exception to § 1738 existed*, and therefore afforded collateral estoppel effect to the Florida default judgment. *Id.*

The Sixth Circuit reached precisely the same conclusion in *In re Calvert*, 105 F.3d 315 (6th Cir. 1997). The facts in *Calvert* were the converse of *Nourbakhsh*, and very similar to the situation below. In *Calvert*, the plaintiff obtained a California state court default judgment for fraud against the defendant, then filed a motion for summary judgment in an adversary proceeding when the defendant later filed for bankruptcy in the Western District of Tennessee. The bankruptcy court denied the motion for summary judgment, finding that the prior default judgment had not been "actually litigated" and that no evidence had been introduced into the record in the California case.[3] *Id.* at 316. The District Court affirmed the decision, but certified the case to the Sixth Circuit for interlocutory appeal. After engaging in an extensive analysis of *Marrese*, *Grogan* and the policies behind bankruptcy, the Sixth Circuit reversed the decision of the bankruptcy court, stating "we conclude that collateral estoppel applies to true default judgments in bankruptcy dischargeability proceedings in those states which would give such judgments that effect." *Id.* at 322.

Finally, the Fifth Circuit has also squarely addressed the issue, and has likewise determined that collateral estoppel effect must be given to default judgments in accordance with the law of the rendering state. *In re Caton*, 157 F.3d 1026 (5th Cir. 1998), *cert. denied*, 526 U.S. 1068, 119 S. Ct. 1462 (1999). Citing *Grogan*, the *Caton* court concluded that, under Illinois law, an Illinois default judgment receives full collateral estoppel effect, and therefore affirmed a finding

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3. The present case provides an even stronger one for application of collateral estoppel since substantial evidence was presented to the state court before it entered the default judgment. (Supplemental Excerpts of Record, Ex. 20, pp. 0309-0436, below).

that the plaintiff's default judgment for libel per se was nondischargeable.[4]

In an attempt to manufacture a conflict among the Circuits for purposes of this petition, Litwak asserts that the Third, Fourth and Seventh Circuits have found that the federal rule of collateral estoppel universally applies in nondischargeability proceedings. In order to reach this result, those Circuits would have been required to find that Congress impliedly repealed § 1738 under the tests set forth in *Marrese* and *Matsushita*. Close examination of the cases cited by Litwak, however, reveals no such findings.

Litwak begins by asserting that the Fourth Circuit held that default judgments cannot be given collateral estoppel effect in *In re Raynor*, 922 F.2d 1146 (4th Cir. 1991), which involved a North Carolina default judgment. However, the *Raynor* court cited neither *Grogan* — which would be decided a few days later — nor *Marrese*, and did not discuss North Carolina law at all.

In fact, subsequent Fourth Circuit cases have followed the *Grogan/Marrese* analysis, and have not found that § 1738 has been impliedly repealed. Indeed, in *In re Ansari*, 113 F.3d 17 (4th Cir. 1997), the Court of Appeals gave collateral estoppel effect to a Virginia default judgment in nondischargeability proceedings after analyzing Virginia law, which had rejected the rule of collateral estoppel

4. While conceding that the Fifth Circuit is in accord with the Sixth and Ninth Circuits, Litwak failed to cite *Caton* — a case which this Court decided not to hear — and instead cited the earlier case of *In re Garner*, 56 F.3d 677 (5th Cir. 1995). The Fifth Circuit reached the same conclusion regarding the application of *Marrese* in *In re Garner* as it did in *Caton*.

advocated by the Restatement (Second) of Judgments.[5] Even more recently, in *In re Genesys Data Technologies, Inc.*, 204 F.3d 124 (2000), the Fourth Circuit applied *Marrese* and *Grogan* to find that a Hawaii default judgment must be given collateral estoppel effect in bankruptcy claims allowance proceedings.

Nor has the Seventh Circuit held that § 1738 has been repealed with respect to state default judgments. As Litwak admits, the case he cites for this proposition, *Meyer v. Rigdon*, 36 F.3d 1375 (7th Cir. 1994), involved a default judgment entered by a federal district court. That case did not address the effect of the Full Faith and Credit statute at all.

Finally, Litwak cites *Matter of McMillan*, 579 F.2d 289 (3rd Cir. 1978), for the proposition that default judgments have no collateral estoppel effect in bankruptcy proceedings. The *McMillan* court refused to give collateral estoppel to a New Jersey default judgment for fraud. However, the *McMillan* case was decided prior to both *Grogan* and *Marrese*, and did not discuss § 1738 or even consider whether New Jersey default judgments are given collateral estoppel effect under the law of that state, instead simply applying the federal rule of collateral estoppel.[6] Moreover, no subsequent Third Circuit case has

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5. The *Ansari* court retrospectively noted that the decision in *Raynor* was correct because, unlike Virginia, North Carolina follows the Restatement rule, and does not accord collateral estoppel effect to default judgments. 113 F.3d at 22. Thus, *Raynor* can no longer be relied upon for the proposition that default judgments can never be given collateral estoppel effect in nondischargeability proceedings.

6. In a concurring opinion, Judge Gibbons did apply § 1738, noting that default judgments in fact are not given collateral estoppel (Cont'd)

explored the issue in the context of nondischargeability proceedings. Thus, contrary to Litwak's assertions, no actual conflict exists among the Circuits.

Notwithstanding the consistent application by the Circuits of *Marrese* and *Grogan*, Litwak nonetheless argues that this Court's earlier decision in *Brown v. Felson*, *supra*, supports the finding of an implied repeal of § 1738.[7] However, as recognized in *Nourbahksh*, *Calvert*, and *Brown* itself, the holding in *Brown* was expressly limited to the doctrine of *res judicata*, and does not govern in the context of collateral estoppel.

In *Brown*, a lender brought a collection suit against a car dealer and the loan guarantor in Colorado state court.

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effect under New Jersey law. Judge Gibbons then went on to opine that, even if New Jersey law were to the contrary, he would find an exception to § 1738. However, as *Marrese* would later teach, this conclusion was unnecessary to Judge Gibbons' analysis given New Jersey law, and in any event was of course not part of the holding in the *McMillan* case.

7. Litwak's argument that *Brown v. Felson* recognized an implied repeal of § 1738, and that this Court's specific holding regarding the doctrine of collateral estoppel in *Grogan* should be ignored, was made by a Bankruptcy Court for the Northern District of Alabama in *In re Wald*, 208 B.R. 516 (Bankr. N.D. Ala. 1997), a case heavily relied upon by Litwak. It should be noted, however, that the only question before *Wald* court was whether to give collateral estoppel effect to an Alabama default judgment. The *Wald* court applied Alabama law and found that, as with federal default judgments, Alabama default judgments do not have collateral estoppel effect. *Id.* at 531. The rest of the decision, which advocates for universal application of the federal rule, is mere dicta.

The guarantor filed a cross-claim against the debtor, alleging that the dealer had induced the guarantor to sign the guaranty with certain misrepresentations. The parties settled the suit by stipulation which provided that the lender could recover jointly and severally against both the dealer and the guarantor, and that the guarantor should have judgment against the dealer. *Brown*, 442 U.S. at 128. The stipulated judgment was not, however, for fraud. *Id.*

The dealer subsequently filed for bankruptcy, seeking to have his debt to the guarantor discharged. The guarantor filed a complaint to determine the debt nondischargeable under § 523 (formerly § 17), and the dealer/debtor moved for summary judgment claiming that the doctrine of *res judicata* barred relitigation of the nature of the debt. In holding that *res judicata* does not always apply in bankruptcy dischargeability proceedings, this Court found that "[r]efusing to apply *res judicata* here would permit the bankruptcy court to make an accurate determination whether respondent in fact committed the deceit, fraud, and malicious conversion which petitioner alleges. These questions are now, for the first time, squarely in issue." *Id.* at 138.

The *Brown* court distinguished between using a judgment to support the validity of an underlying debt and attempting to use that same judgment "to meet . . . the new defense of bankruptcy which [the debtor] has interposed between [the creditor] and the sum determined to be due him." *Id.* at 133. Indeed, *Brown* specifically stated that, "If, in the course of adjudicating a state-law question, a state court should determine factual issues using standards identical to those of [§ 523], then collateral estoppel, in the absence of countervailing statutory policy, would bar relitigation of those issues in the bankruptcy court."

Brown, supra, 442 U.S. at 139 n.10. Of course, this Court subsequently amplified this point in *Grogan* where it unequivocally stated, "we now clarify that collateral estoppel principles do indeed apply in discharge exception proceedings pursuant to § 523(a)." *Grogan*, 498 U.S. at 139. Therefore, *Brown* does not compel federal courts to ignore § 1738; to the contrary, this Court's subsequent decision in *Grogan* mandates the opposite result.[8]

II. There Is No Constitutional Requirement That Federal Collateral Estoppel Principles Be Applied To State Default Judgments In Bankruptcy Proceedings.

Litwak insists that application of state collateral estoppel principles in the default context conflicts with Congress' constitutional power to establish "uniform laws on the subject of bankruptcies." *See* Constitution, Art. 1, § 8, cl. 4. However, this Court has already clearly held in *Grogan* that collateral estoppel effect must be given to state judgments in nondischargeability proceedings. Obviously, then, the *Grogan* court did not believe that application of collateral estoppel conflicted with the uniformity requirement. This is not surprising, since, as this Court has repeatedly held — including in the very cases relied upon by Litwak — the uniformity requirement does not mandate an abandonment of state law principles.

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8. Of course, if Congress disagreed with this reading of *Grogan*, it could expressly repeal § 1738 with respect to the application of default judgments to nondischargeability proceedings. Indeed, a proposal to this effect was included in the Consumer Lender and Borrowers Bankruptcy Accountability Act of 1998, but the bill was not enacted. H.R. 3146 § 14(f), 105th Cong., 2d Sess. (1997). While bankruptcy reform legislation of various stripes has been introduced in the current session of Congress, the provision regarding default judgments has not been re-introduced.

Indeed, this point was very recently reiterated by this Court in *Raleigh v. Illinois Department of Revenue*:

> The "basic federal rule" in bankruptcy is that state law governs the substance of claims, [*Butner v. United States*, 440 U.S. 48, 57, 99 S. Ct. 914 (1979)], Congress having "generally left the determination of property rights in the assets of a bankrupt's estate to state law," [*Butner*, 440 U.S. at 54]. "Unless some federal interest requires a different result, there is no reason why [the state] interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." 440 U.S. at 55.

__ U.S. __, 120 S. Ct. 1951, 1955 (2000).

This Court also discussed the uniformity requirement in *Railway Labor Executives' Assn. v. Gibbons, Trustee, et al.*:

> The uniformity requirement is not a straitjacket that forbids Congress to distinguish among classes of debtors, nor does it prohibit Congress from recognizing that state laws do not treat commercial transactions in a uniform manner. A bankruptcy law may be uniform yet "may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States."

455 U.S. 457, 469, 102 S. Ct. 1169 (1982), citing *Stellwagen v. Clum*, 245 U.S. 605, 613, 38 S. Ct. 215 (1918) and *Hanover National Bank v. Moyses*, 186 U.S. 181, 22 S. Ct. 857 (1902).

Thus, as this Court has held time and time again, Litwak's concern that determinations as to the effect of default judgments may differ from state to state does not run afoul of the uniformity requirement.[9] Rather, giving full faith and credit to state default judgments in accordance with § 1738 is entirely consistent with "the basic federal rule" referenced in *Raleigh* as well as the holding of *Grogan*.

III. The Peculiar Facts Of This Case Make It A Poor Choice For Examination Of The Issues Presented.

In the unlikely event that the Court believes that Litwak's Petition presents a legal issue meriting review, it should still deny certiorari here, because the unusual facts of this case make it a poor one for consideration of the issues presented. Litwak was no "innocent" defaulter, who had no idea of the consequences of failing to defend the complaint against him. Litwak knew that a lawsuit had been filed against him and *that his default had been entered*, even appearing for his deposition to testify in the case after this had occurred. (Excerpts of Record, Ex. 6, p. 0163, below). He had his opportunity to have his day in court. He chose not to exercise that right, never moving to set aside the default; nor did he file for bankruptcy at that time, presumably because he assumed that he could always do so at a later date and further delay the consequences of his admitted "improper and wrongful" conduct. (Supplemental Excerpts of Record, Ex. 20, p. 0368, below). Litwak nonetheless now seeks a second chance to litigate the factual issues in the state court action.

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9. Litwak's concern that a given state's law on the effect of default judgments may itself be unclear does not pose a new problem for federal courts, which must determine how a state's highest court would decide state law questions any time the *Erie* doctrine applies. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

As stated in *Grogan*, and very recently reaffirmed by this Court, "the Bankruptcy Code has long prohibited debtors from discharging liabilities incurred on account of their fraud, embodying a basic policy animating the Code of affording relief only to an 'honest but unfortunate debtor.' " *Cohen v. Hilda de la Cruz*, 523 U.S. 213, 217, 118 S. Ct. 1212 (1998). Litwak's actions, however, were not those of an honest or unfortunate debtor. This case is therefore not an appropriate one for high court review.

CONCLUSION

For all the foregoing reasons, Litwak's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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